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9 IN THE UNITED STATES DISTRICT COURT

10 FOR THE DISTRICT OF OREGON

11 OREGON SCHOOL ACTIVITIES )  
12 ASSOCIATION, )

13 Plaintiff, )

14 v. )

15 NATIONAL UNION FIRE INSURANCE )  
16 COMPANY OF PITTSBURGH, PENN- )  
17 SYLVANIA, )

Defendant. )

No. CV-05-214-HU

OPINION & ORDER

18 Jonathan M. Radmacher  
19 J. Kurt Kraemer  
20 McEWEN GISVOLD LLP  
1100 S.W. Sixth Avenue, Suite 1600  
Portland, Oregon 97204

21 Attorneys for Plaintiff

22 Donald Verfurth  
23 CARNEY BADLEY SPELLMAN, P.S.  
24 700 Fifth Avenue, Suite 5800  
Seattle, Washington 98104-5017

Attorneys for Defendant

25 HUBEL, Magistrate Judge:

26 Plaintiff Oregon Schools Activities Association brings this  
27 insurance coverage dispute against defendant National Union Fire  
28

1 Insurance Company of Pittsburgh, Pennsylvania, regarding  
2 defendant's failure to pay past and ongoing costs to plaintiff for  
3 underlying litigation against plaintiff. Both parties move for  
4 summary judgment. Both parties have consented to entry of final  
5 judgment by a Magistrate Judge in accordance with Federal Rule of  
6 Civil Procedure 73 and 28 U.S.C. § 636(c). I grant defendant's  
7 motion and I deny plaintiff's motion.

8 BACKGROUND

9 Defendant issued to plaintiff two insurance policies covering  
10 certain claims against plaintiff. The first policy had a "policy  
11 period" of August 1, 1999, to August 1, 2000 ("the 1999 policy"),  
12 and the second had a "policy period" of August 1, 2000, to August  
13 1, 2001 ("the 2000 policy").

14 In the spring of 2000, a dispute arose between plaintiff and  
15 students at the Portland Adventist Academy regarding plaintiff's  
16 scheduling of the Class 2A Oregon High School Basketball  
17 Tournament. The students' religious beliefs prohibit them from  
18 engaging in certain activities during their Saturday Sabbath, from  
19 sundown Friday to sundown Saturday. The students requested that  
20 plaintiff prohibit events scheduled during this time.

21 On May 8, 2000, the students presented their claim of  
22 religious discrimination to plaintiff's Executive Board. Exh. 1 to  
23 July 5, 2005 Neal Philip Affid. On June 3, 2000, the Executive  
24 Board's President issued a written Order and Opinion denying the  
25 students' complaint. Id. On June 30, 2000, the students appealed  
26 that Order to the State of Oregon's Superintendent of Public  
27 Instruction. Exh. 2 to July 5, 2005 Philip Affid. In the appeal  
28 letter, the students, identified as "claimants," requested a

1 hearing and a variety of relief. Id. June 30, 2000, is between  
2 August 1, 1999, and August 1, 2000, the 1999 policy period.

3 Defendant received notice of the claim on or about March 2,  
4 2001, when plaintiff first reported the claim to defendant. Exh.  
5 6 to July 5, 2005 Philip Affid. March 2, 2001, is between August  
6 1, 2000, and August 1, 2001, during the 2000 policy period. In a  
7 September 19, 2002 letter, defendant denied coverage of the claim  
8 because it was not made and reported during the policy period of  
9 August 1, 2000, to August 1, 2001. Exh. F. to Aug. 29, 2005 Donald  
10 Verfurth Affid. In a subsequent letter dated July 15, 2004,  
11 defendant reiterated its position that because the claim was first  
12 made before the inception of the August 1, 2000, to August 1, 2001  
13 policy period, and defendant did not receive notice of the claim  
14 until March 2, 2001, there was no coverage for the matter. Exh. 1  
15 to July 18, 2005 Kurt Kraemer Affid. Defendant also reminded  
16 plaintiff of Clause 8 of the policy, prohibiting the insured from  
17 incurring defense costs without the insurer's prior written  
18 consent. Id. Defendant also recommended that plaintiff contact  
19 its general liability carrier and any other insurance carriers  
20 where coverage may be applicable. Id.

21 This litigation began after defendant denied plaintiff's claim  
22 under the policy.

### 23 STANDARDS

24 Summary judgment is appropriate if there is no genuine issue  
25 of material fact and the moving party is entitled to judgment as a  
26 matter of law. Fed. R. Civ. P. 56(c). The moving party bears the  
27 initial responsibility of informing the court of the basis of its  
28 motion, and identifying those portions of "'pleadings, depositions,

1 answers to interrogatories, and admissions on file, together with  
2 the affidavits, if any,' which it believes demonstrate the absence  
3 of a genuine issue of material fact." Celotex Corp. v. Catrett,  
4 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)).

5 "If the moving party meets its initial burden of showing 'the  
6 absence of a material and triable issue of fact,' 'the burden then  
7 moves to the opposing party, who must present significant probative  
8 evidence tending to support its claim or defense.'" Intel Corp. v.  
9 Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991)  
10 (quoting Richards v. Neilsen Freight Lines, 810 F.2d 898, 902 (9th  
11 Cir. 1987)). The nonmoving party must go beyond the pleadings and  
12 designate facts showing an issue for trial. Celotex, 477 U.S. at  
13 322-23.

14 The substantive law governing a claim determines whether a  
15 fact is material. T.W. Elec. Serv. v. Pacific Elec. Contractors  
16 Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). All reasonable doubts as  
17 to the existence of a genuine issue of fact must be resolved  
18 against the moving party. Matsushita Elec. Indus. Co. v. Zenith  
19 Radio, 475 U.S. 574, 587 (1986). The court should view inferences  
20 drawn from the facts in the light most favorable to the nonmoving  
21 party. T.W. Elec. Serv., 809 F.2d at 630-31.

22 If the factual context makes the nonmoving party's claim as to  
23 the existence of a material issue of fact implausible, that party  
24 must come forward with more persuasive evidence to support his  
25 claim than would otherwise be necessary. Id.; In re Agricultural  
26 Research and Tech. Group, 916 F.2d 528, 534 (9th Cir. 1990);  
27 California Architectural Bldg. Prod., Inc. v. Franciscan Ceramics,  
28 Inc., 818 F.2d 1466, 1468 (9th Cir. 1987).

DISCUSSION

I. Preliminary Issue Regarding Authentication of Defendant's Summary Judgment Exhibits

In its response to defendant's motion, plaintiff argues that Exhibits 1, 2, and 6 to Philip's July 5, 2005 Affidavit, submitted by defendant in support of its motion, should be stricken for lack of proper authentication. Exhibit 1 is a copy of the "Order and Opinion Denying Complaint, dated June 3, 2000, issued by plaintiff and signed by John Harrington. Exhibit 2 is a copy of a June 20, 2000 letter from Charlie Hinkle, attorney representing the "claimants," meaning the students from Portland Adventist Academy, to Stan Bunn, Oregon Superintendent of Public Instruction, seeking a hearing and certain relief. Exhibit 6 is a copy of a letter dated March 2, 2001, from Lowell T. Gratigny of American Specialty Insurance Services, Inc., to Pam Schwager of AI Management, regarding plaintiff's claim.

Without deciding whether the exhibits were properly authenticated as originally submitted, I reject plaintiff's argument because defendant cured any authentication errors with the additional submissions it made with its reply brief. In Philip's August 1, 2005 Supplemental Affidavit, he states that Exhibits 1 and 2 were produced to defendant by plaintiff with plaintiff's Rule 26(a) disclosure. Attached to the Supplemental Affidavit is a true and correct copy of the disclosure, produced to defendant by plaintiff on April 25, 2005, along with copies of Exhibits 1 and 2, both of which accompanied the disclosure.

Additionally, defendant submits an affidavit from Hinkle who authored Exhibit 2. Hinkle attests that the copy of the June 30,

1 2000 letter addressed to Bunn and attached to his affidavit, is a  
2 true and correct copy of that letter.

3 Finally, defendant submits the declaration of Taffy Troup  
4 authenticating documents American Specialty Insurance Services,  
5 Inc., produced to defendant in this litigation, one of which was  
6 Exhibit 6.

7 For Exhibits 1, 2, and 6 to Philip's July 5, 2005 Affidavit,  
8 no authentication issues remain given the additional documents  
9 submitted with defendant's reply.

## 10 II. Relevant Policy Provisions

11 The relevant portions of the 1999 policy and the 2000 policy  
12 are the same. Because, as noted below, there is no dispute that  
13 plaintiff received notice of the claim against it during the 1999  
14 policy, I quote from that policy.

15 The policy defines "claim" as follows:

16 (1) a written demand for monetary relief; or

17 (2) a civil, criminal, regulatory or  
18 administrative proceeding for monetary or non-  
monetary relief which is commenced by:

19 (I) service of a complaint or similar pleading;

20 (ii) return of an indictment (in the case of a  
21 criminal proceeding); or

22 (iii) receipt or filing of a notice of charges; or

23 (3) any request to toll or waive any statute of limitations.

24 Exh. 4 to July 5, 2005 Philip Affid. at p. 4.

25 "Policy Period" and "Policy Year" are defined as follows:

26 "Policy Period" means the period of time from the  
27 inception date shown in Item 3 of the Declarations to the  
28 earlier of the expiration date shown in Item 3 of the  
Declarations or the effective date of cancellation of  
this policy.

1 "Policy Year" means a period of one year, within the  
2 Policy Period, commencing each year on the day and hour  
3 first named in Item 3 of the Declarations, or if the time  
4 between the effective date or anniversary and termination  
5 of the Policy is less than one year, then such lesser  
6 period.

7 Exh. 4 to July 5, 2005 Philip Affid. at p. 5

8 Various parts of the policy relate to claim reporting  
9 requirements. The first page of the Policy Declarations for the  
10 1999 policy states:

11 NOTICE: EXCEPT TO SUCH EXTENT AS MAY OTHERWISE BE  
12 PROVIDED HEREIN, THE COVERAGE OF THIS POLICY IS GENERALLY  
13 LIMITED TO LIABILITY FOR ONLY THOSE CLAIMS THAT ARE FIRST  
14 MADE AGAINST THE INSURED DURING THE POLICY PERIOD AND  
15 REPORTED IN WRITING TO THE INSURER PURSUANT TO THE TERMS  
16 HEREIN.

17 Id. at p. 1.

18 In the body of the policy, the section entitled "Insuring  
19 Agreements" provides:

20 COVERAGE A: INDIVIDUAL INSURED INSURANCE

21 This policy shall pay on behalf of each and every  
22 Individual Insured Loss arising from a Claim first made  
23 against such Individual Insured during the Policy Period  
24 or the Discovery Period (if applicable) and reported to  
25 the Insurer pursuant to the terms of this policy . . . .

26 COVERAGE B: ORGANIZATION INDEMNIFICATION REIMBURSEMENT  
27 INSURANCE

28 This policy shall pay on behalf of the Organization Loss  
arising from a Claim first made against an Individual  
Insured during the Policy Period or the Discovery Period  
(if applicable) and reported to the Insurer pursuant to  
the terms of this policy . . . .

COVERAGE C: ORGANIZATION ENTITY COVERAGE

This policy shall pay on behalf of the Organization Loss  
arising from a Claim first made against the Organization  
Loss arising from a Claim first made against the  
Organization during the Policy Period or the Discovery  
Period (if applicable) and reported to the Insurer  
pursuant to the terms of this policy. . . .

Id. at p. 3.

1 Section 7 of the 1999 Policy is entitled "NOTICE/CLAIM  
2 REPORTING PROVISIONS." It provides, in pertinent part:

3 Notice hereunder shall be given in writing to the Insurer  
4 named in Item 8 of the Declarations at the address  
5 indicated in Item 8 of the Declarations. If mailed, the  
6 date of mailing shall constitute the date that such  
7 notice was given and proof of mailing shall be sufficient  
8 proof of notice. A Claim shall be considered to have  
9 been first made against an Insured when written notice of  
10 such Claim is received by any Insured, by the Named  
11 Organization on the behalf of any Insured or by the  
12 Insurer, whichever comes first.

13 (a) The Insureds shall, as a condition precedent to the  
14 obligations of the Insurer under this policy, give  
15 written notice to the Insurer of any Claim made  
16 against an Insured as soon as practicable and  
17 either:

18 (1) anytime during the Policy Year or during the  
19 Discovery Period (if applicable); or

20 (2) within 30 days after the end of the Policy Year  
21 or the Discovery Period (if applicable), as long as  
22 such Claim is reported no later than 30 days after  
23 the date such Claim was first made against an  
24 Insured.

25 Id. at p. 6.

### 26 III. Defendant's Motion

27 Defendant contends that the claim against plaintiff is not  
28 covered by any policy issued to plaintiff by defendant because  
29 plaintiff did not provide notice of the claim to defendant during  
30 the policy period in which plaintiff received the claim. For the  
31 reasons explained below, I agree with defendant.

#### 32 A. Timeliness of Notice

33 The parties do not dispute that plaintiff received notice of  
34 a "claim" against it by the students, as that term is defined in  
35 the policy, on or about June 30, 2000. There also is no dispute  
36 that notice to defendant of the claim against plaintiff did not  
37 occur until March 2, 2001, when Gratigny, of American Specialty

1 Insurance Services and acting on plaintiff's behalf, wrote to  
2 Schwager, Director of Complex Claims for AI Management, regarding  
3 the claim against plaintiff.

4 Defendant argues that there is no coverage for the claim under  
5 either the 1999 policy or the 2000 policy. Under the terms of the  
6 those policies, plaintiff was required to provide defendant with  
7 notice of the students' claims during the same policy period in  
8 which plaintiff received the claim. Plaintiff was required to  
9 report the claim to defendant while the 1999 policy was still in  
10 effect, no later than August 1, 2000. Because it did not do so,  
11 defendant contends, the claim is not covered under either policy.

12 Defendant cites several cases regarding "claims-made" policies  
13 and how they differ from occurrence policies. I noted the  
14 distinction in a 2002 Opinion & Order in which I explained:

15 To successfully invoke coverage under a claims-made  
16 policy, a claim must be made against the insured during  
17 the policy period and the insured must notify the insurer  
18 of the claim during the same period. See Matador  
19 Petroleum Corp. v. St. Paul Surplus Lines Ins. Co., 174  
F.3d 653, 658-59 & 658 n.2 (5th Cir. 1999). Unlike  
occurrence policies, the notice condition must be met to  
trigger coverage. Id. at 659. The Matador court  
explained:

20 The fact that courts strictly enforce notice  
21 requirements in "claims-made" policies, but take a  
22 distinct approach towards notice requirements in  
23 "occurrence" policies, reflects a difference in the  
24 nature of the bargain underlying each type of  
25 policy. Courts interpret notice provisions in  
"claims-made" policies strictly because in these  
types of policies, unlike in "occurrence" policies,  
the insured and insurer specifically negotiate the  
terms of the notice provisions.

26 Id.; see also Aetna Cas. & Sur. Co. v. Pintlar Corp., 948  
27 F.2d 1507, 1516 (9th Cir. 1991) ("An "occurrence" policy  
28 protects the policyholder from liability for any act done  
while the policy is in effect, whereas a "claims made"  
policy protects the holder only against claims made  
during the life of the policy.") (quoting St. Paul Fire

1       & Marine Ins. Co. v. Barry, 438 U.S. 531, 535 n.3  
2       (1978)).

3       Maffett v. Westport Ins. Corp., No. CV-01-3078-HU, Op. & Ord. at p.  
4       8 (D. Or. Apr. 15, 2002).

5       Considering the undisputed facts regarding when the claim was  
6       made against plaintiff and when plaintiff notified defendant of the  
7       claim along with the language of the policy and the cases  
8       discussing the difference between claims-made and occurrence  
9       policies, it is clear that plaintiff's claim for defense costs was  
10      untimely.

11           B. Plaintiff's Arguments in Support of Coverage

12       Plaintiff contends that its insurance claim is covered because  
13       defendant waived its right to assert timeliness as a defense and  
14       because defendant has suffered no prejudice as a result of the late  
15       claim. Plaintiff also contends that certain policy provisions are  
16       ambiguous.

17           1. Waiver

18       Plaintiff concedes that defendant raised the timeliness of  
19       notice issue in its initial response to plaintiff's claim.  
20       Plaintiff argues, however, that defendant waived its right to raise  
21       timeliness as a defense to plaintiff's claim because later, after  
22       initially raising timeliness, defendant raised additional defenses,  
23       including the failure to obtain defendant's consent before  
24       incurring defense costs in the underlying action. According to  
25       plaintiff, when defendant asserts such additional defenses, it  
26       suggests that even if plaintiff's notice had been timely, defendant  
27       would still deny the claim based on the other defense, and thus,  
28       defendant has waived the right to rely on untimely notice as a

1 defense.

2 I reject this argument. First, a "waiver of notice" argument  
3 is typically asserted when the insurer completely fails to raise  
4 notice before litigation, e.g., School Dist. No. 1, Multnomah  
5 County v. Mission Ins. Co., 58 Or. App. 692, 712, 60 P.2d 929, 942  
6 (1982), or initially raises other defenses and only belatedly adds  
7 the untimely notice issue. Plaintiff's argument would effectively  
8 write all non-notice defenses out of an insurance policy. Insurers  
9 would have to choose at their peril between a notice defense and  
10 any other defense. There is nothing in the contract language to  
11 support this.

12 Second, even if defendant had not previously raised untimely  
13 notice as a defense, I would reject plaintiff's argument for the  
14 reasons previously I explained in Maffett:

15 Oregon courts have held, in the context of  
16 occurrence policies, that an insurer waives the defenses  
17 of failure to give notice or to furnish proofs of loss,  
18 or defects in the notice or proofs, when it denies  
19 liability on other grounds. See School Dist. No. 1,  
20 Multnomah County v. Mission Ins. Co., 58 Or. App. 692,  
21 711, 60 P.2d 929, 942 (1982). According to plaintiff,  
22 after he notified defendant of the state case on May 25,  
23 1999, defendant denied coverage repeatedly for reasons  
24 other than the late notice, and it was not until May 4,  
25 2001, nearly two years after plaintiff's initial tender  
26 in 1999, and after plaintiff's third tender of the state  
27 case to defendant, that defendant first raised the notice  
28 issue.

While I accept plaintiff's representations as true,  
... , I reject plaintiff's argument. As indicated  
above, notice under an occurrence policy is intended to  
serve an entirely different purpose than under a claims-  
made policy. As defendant explains, "[f]ailure to comply  
with the notice provision of an occurrence policy would  
result in a forfeiture of already existing coverage,  
while notice under a claims-made policy is the very act  
that creates coverage." Deft's Reply Mem. at p. 10.

Thus, even if defendant denied coverage initially on  
other grounds, its conduct cannot create coverage that  
did not exist under the policy. See Farmers Ins. v.  
Munson, 127 Or. App. 413, 418, 873 P.2d 370, 373 (1994)

1 ("Waiver may be available to prevent an insurer from  
2 asserting a policy defense if the defense is a condition  
3 of forfeiture, but not if it is a condition of  
4 coverage"); see also ABCD ... Vision, Inc. v. Fireman's  
5 Fund Ins. Cos., 304 Or. 301, 306, 774 P.2d 998, 1001  
(1987) (making distinction between conditions of coverage  
and conditions of forfeiture and holding that "[e]stoppel  
cannot be invoked to expand insurance coverage or the  
scope of an insurance contract.").

6 With an occurrence policy, coverage exists by virtue  
7 of an act occurring within the policy period. Coverage  
8 may be forfeited by the insured if it fails to timely  
9 notify the insurer. Waiver may apply to defeat the  
forfeiture defense. However, with a claims-made policy,  
the coverage is non-existent until timely notice is made.  
Plaintiff cannot create coverage with a waiver argument  
in the context of a claims-made policy.

10 Maffett, Op. & Ord. at pp. 9-10.

11 For the reasons previously explained in Maffett, I reject  
12 plaintiff's waiver argument.

## 13 2. Prejudice

14 Next, plaintiff contends that under Oregon law, defendant must  
15 demonstrate that it has suffered prejudice as a result of the  
16 timing of the notice before it can deny plaintiff's claim. I  
17 rejected this argument in Maffett:

18 For occurrence policies, Oregon law provides that an  
19 insurer may not rely on an insured's failure to give  
timely notice unless the insurer can show prejudice.  
20 Lusch v. Aetna Cas. & Sur. Co., 272 Or. 593, 597, 538  
P.2d 902, 904 (1975). Plaintiff argues that contrary to  
the law as established in several other jurisdictions,  
21 this same principle should extend to claims-made  
policies. Both plaintiff and defendant agree that no  
22 Oregon case has applied the "notice-prejudice" rule in a  
claims-made policy.

23 In a Ninth Circuit case interpreting California law,  
the court held that the notice-prejudice rule does not  
24 apply to claims-made policies. Burns v. International  
Ins. Co., 929 F.2d 1422, 1425 (9th Cir. 1991). The court  
25 observed that the distinction between occurrence and  
claims-made policies is critical. Id. "A claims-made  
26 policy reduces the potential exposure of the insurer and  
is therefore less expensive to the insured. To apply the  
27 notice-prejudice rule to a claims-made policy would be to  
rewrite the policy, extending the policy's coverage at no  
28 cost to the insured." Id.

1 The reasoning behind the prohibition on applying the  
2 notice-prejudice rule in claims-made cases is explained  
3 well by the Washington Court of Appeals in a 1989 case.  
4 Safeco Title Ins. Co. v. Gannon, 54 Wash. App. 330, 774  
5 P.2d 30 (1989). The court stated that "it makes sense  
6 from a public policy standpoint to apply the notice-  
7 prejudice rule to notice provisions in occurrence  
8 policies because to do so merely preserves existing  
9 coverage and, absent a showing of prejudice, does not  
10 materially alter the insurer's risk." Id.

11 In contrast, in a claims-made policy where a claim  
12 must be reported during the policy period to invoke  
13 coverage in the first instance, to apply the notice-  
14 prejudice rule "would materially alter the insurer's risk  
15 by making it difficult to ascertain potential liability  
16 with certainty at the end of the policy period." Id.  
17 The result "would be to provide coverage the insurer did  
18 not intend to provide and the insured did not contract to  
19 receive." Id.

20 In a 1998 case from the Middle District of  
21 Pennsylvania, the court explained that

22 whereas the notice provision in an occurrence  
23 policy allows the insurer time to investigate,  
24 defend or settle the claim, the notice provision in  
25 a claims-made policy provides the insurer with a  
26 date certain on which its liability expires,  
27 allowing the insurer to more accurately fix its  
28 reserves for future liabilities and compute  
premiums with greater certainty. . . . In light of  
the different purposes underlying the issuance of  
these two types of policies, . . . a claims-made  
insurer need not show prejudice in order to enforce  
a notice provision.

29 Ehrgood v. Coregis Ins. Co., 59 F. Supp. 2d 438, 444  
30 (M.D. Pa. 1998) (citation and internal quotation  
omitted).

31 Plaintiff relies on a 1999 Seventh Circuit decision  
32 in which the court ruled that, under Wisconsin law, the  
33 notice-prejudice rule applied to claims-made policies.  
34 Lexington Ins. Co. v. Rugg & Knopp, Inc., 165 F.3d 1087  
35 (7th Cir. 1999). There, the court acknowledged the  
36 weight of authority holding that a notice-prejudice rule  
37 does not apply to claims-made policies because it would  
38 convert claims-made policies into occurrence policies,  
altering a basic term of the contract. Id. at 1092.  
After making that acknowledgment, the court then  
concluded that it was bound by a Wisconsin statute  
mandating that the notice-prejudice rule be applied to  
"every" liability insurance policy." Id. at 1092-93.  
I agree with defendant that the Lexington case is not  
persuasive authority in the absence of a similar Oregon  
statute.

39 Plaintiff also relies on a Tenth Circuit case which

1 applied the notice-prejudice rule in a claims-made policy  
2 under Kansas law. Phico Ins. Co. v. Providers Ins. Co.,  
3 888 F.2d 663 (10th Cir. 1989). The court's holding,  
4 however, appears limited to the particular facts of that  
5 case. There, the insurer took action on oral notice  
6 provided to the insurer by the insured, including  
7 undertaking an investigation to determine its rights and  
8 liabilities. Id. at 669. The court noted that the facts  
9 and circumstances of the case, and concessions by counsel  
10 at oral argument, were consistent with the theory that  
11 the insurer had impliedly waived the written notice  
12 [requirement] based on its acts and conduct. Id. at 668.  
13 Under such circumstances, the court held that the insurer  
14 had to show actual prejudice caused by the absence of  
15 written notice by the insured. Id. at 669.

16 Here, the only notice provided to defendant was the  
17 written tender in May 1999. There is no act by defendant  
18 to suggest an implied waiver of the policy's written  
19 notice requirement. Thus, Phico is distinguishable.

20 The cases cited by plaintiff are not on point,  
21 either because of distinct facts or because of a  
22 difference in the law. I agree with the reasoning  
23 expressed by the Ninth Circuit in Burns, the Middle  
24 District of Pennsylvania in Ehrgood, and the Washington  
25 Court of Appeals in Gannon. I see no reason why Oregon  
26 courts would not follow the majority of jurisdictions to  
27 have considered this issue and conclude that the notice-  
28 prejudice rule does not apply in a claims-made policy.

Maffett, Op & Ord. at pp. 10-13.

For the reasons explained in Maffett, I reject plaintiff's  
argument on prejudice.

I also reject plaintiff's additional argument that because the  
policies lack express forfeiture provisions, defendant must show  
prejudice from the late notice. Plaintiff bases this argument on  
a Kansas court's reference to the Phico case. In National Union  
Fire Insurance Co. of Pittsburgh, Pennsylvania v. FDIC, 264 Kan.  
733, 957 P.2d 357 (1998), the court was asked to apply a prejudice  
rule to an untimely proof of loss in the context of a fidelity  
bond.

The court first determined that there was a lack of  
distinction between an insurance contract and a fidelity bond and

1 held that a fidelity bond was equivalent to an insurance  
2 relationship. Id. at 738-39, 957 P.2d at 362. The court then  
3 reviewed earlier Kansas cases on the issue of whether the  
4 application of a notice-prejudice rule should be extended from a  
5 notice of loss to a proof of loss. The court concluded that the  
6 prejudice requirement should apply to a proof of loss. Id. at 742,  
7 957 P.2d at 363.

8 One of the arguments the insurer made as to why the notice-  
9 prejudice requirement should not apply to the proof of loss  
10 provision in the fidelity bond at issue was that the bond was akin  
11 to a discovery policy which in turn was akin to a claims-made  
12 policy to which the notice-prejudice requirement had traditionally  
13 not been applied. The National Union court had two responses to  
14 that argument.

15 First, the National Union court cited to Phico for the  
16 proposition that the Tenth Circuit had applied the notice-prejudice  
17 rule to a claims-made policy under Kansas law. As part of its  
18 discussion of Phico, the National Union court quoted the part of  
19 the Phico decision generally discussing the notice-prejudice rule:

20 "Thus, many courts apply the rule that, in the absence of  
21 an express forfeiture clause, if the insured gives the  
22 insurer timely and adequate notice, even though no  
23 submitted in writing or in keeping with policy terms, it  
24 is for the obligation of the insurer to show actual  
25 prejudice for denial of coverage."

26 Id. at 744-45, 957 P.2d at 364 (quoting Phico, 888 F.2d at 668).

27 Second, the National Union court determined that the  
28 bond/discovery policy in the case before it was not equivalent to  
a claims-made policy. Id. at 745, 957 P.2d at 364-65. Rather, the  
court relied favorably on a District of New Jersey case which had

1 distinguished the features of claims-made and discovery policies  
2 and concluded that they should not be considered equivalent to one  
3 another. Id. (citing Resolution Trust Corp. v. Moskowitz, 868 F.  
4 Supp. 634, 647 (D.N.J. 1994)).

5 Plaintiff relies on National Union's quote from Phico that in  
6 the absence of an express forfeiture clause, the notice-prejudice  
7 rule applies. I reject this argument.

8 First, the National Union's quote of the passage from Phico  
9 was not required for its holding because after noting the Phico  
10 case, the National Union court determined that the bond/policy at  
11 issue was not equivalent to a claims-made policy. Thus, the  
12 court's reliance on Phico was not necessary to its ultimate  
13 conclusion that the notice-prejudice rule should apply to a proof  
14 of loss provision in the bond. Accordingly, plaintiff's reliance  
15 on National Union for the proposition that the court there held  
16 that a notice-prejudice rule applies to claims-made policies which  
17 lack an express forfeiture provision is without support.

18 Second, the quote from Phico in National Union was part of the  
19 Phico court's general discussion of notice-prejudice law. The  
20 actual holding, as noted in the portion of Maffett discussed above,  
21 was limited to the facts. The court explained that if there was an  
22 absence of an express forfeiture clause, and if the insured had  
23 given timely and oral notice of a claim or occurrence even though  
24 not compliant with a policy provision requiring written notice, and  
25 if the insurer had acted on the oral notice given to begin its  
26 investigation, then the insurer's actions amount to a waiver of a  
27 written notice requirement. Phico, 888 F.2d at 669. No such facts  
28 appear here.

1 For the reasons explained in Maffett, the more persuasive  
2 reasoning supports a conclusion that the notice-prejudice rule  
3 should not apply in claims-made policies.

### 4 3. Ambiguous Notice Provisions

5 Plaintiff argues that the policy's notice provisions are  
6 ambiguous because they contain attributes of both a claims-made  
7 policy and a "discovery" policy which plaintiff equates to an  
8 occurrence policy. Specifically, plaintiff points to the "as soon  
9 as practicable" language in the notice provision. Plaintiff argues  
10 that because the policies require both notice within the term of  
11 the policy period, typical of a claims-made policy, and as soon as  
12 practicable, typically required in discovery/occurrence policies,  
13 the policy language is ambiguous, requiring a decision by the  
14 factfinder regarding the parties' intent.

15 I reject this argument. As explained by the Sixth Circuit:

16 [T]he NOTICE OF CLAIM provision of subparagraph A of  
17 paragraph X, quoted above, in declaring that "the insured  
18 shall, as soon as practicable, give written notice of any  
19 claim . . .," does not render ambiguous the explicit  
20 claim reporting requirement spelled out in paragraph I,  
21 THE COVERAGE, provision. The district court stated, and  
22 we agree, that the "'as soon as practicable' notice  
23 provision is intended to protect the insurer from  
24 prejudice due to delayed notification of claims covered  
25 by the insurance policy." The "as soon as practicable"  
26 language is intended to preclude an insured who has  
27 knowledge of a claim near the beginning of the policy  
28 period, from waiting many months until near the end of  
the policy period to notify the insurer of the existence  
of the claim, when such delay would cause prejudice to  
the insurer. It does not excuse, modify, or render  
ambiguous the claim reporting requirement that is recited  
in paragraph I as a condition of coverage.

United States v. A.C. Strip, 868 F.2d 181, 186-87 (6th Cir. 1989);  
see also Lexington Ins. Co. v. St. Louis Univ, 88 F.3d 632, 634  
(8th Cir. 1996) (relying on "as soon as practicable" language in

1 the policy's reporting and claims handling endorsement as  
2 additional evidence that the policy unambiguously was a claims-made  
3 policy).

4 Moreover, the other policy provisions unambiguously confirm  
5 that this is a claims-made policy. For example, the first page of  
6 the policy bears a notice providing that "except to such extent as  
7 may otherwise be provided herein, the coverage of this policy is  
8 generally limited to liability for only those claims that are first  
9 made against the insured during the policy period and reported in  
10 writing to the insurer pursuant to the terms herein." Exh. 4 to  
11 July 5, 2005 Philip Affid. at p. 1. Later, the policy provides  
12 that it "shall pay on behalf of each and every Individual Insured  
13 Loss arising from a Claim first made against such Individual during  
14 the Policy Period . . . and reported to the Insurer pursuant to the  
15 terms of this policy . . . ." Id. at p. 3.

16 There is no ambiguity regarding the status of these policies  
17 as claims-made policies or as to their notice reporting  
18 requirements.

19 Because plaintiff's notice to defendant regarding the claim  
20 against it was untimely, and because I reject plaintiff's waiver,  
21 prejudice, and ambiguity arguments, I grant defendant's motion for  
22 summary judgment.

#### 23 IV. Plaintiff's Motion

24 Plaintiff's motion is premised on a denial of defendant's  
25 motion because it assumes an acceptance of plaintiff's waiver  
26 argument in the first instance. Plaintiff goes on to contend that  
27 once waiver is accepted, the only remaining question, and the issue  
28 that is the focus of its motion, is whether plaintiff has suffered

1 a compensable loss. Because it argues that there are no material  
2 disputes on that issue, it is entitled to partial summary judgment  
3 in its favor, with the exact amount of costs owed to be determined  
4 in the future.

5 For the reasons explained above in connection with defendant's  
6 motion, I reject plaintiff's waiver argument. As a result, I do  
7 not consider plaintiff's arguments regarding the compensability of  
8 the claim. I deny plaintiff's motion for summary judgment.

9 CONCLUSION

10 I grant defendant's motion for summary judgment (#18) and I  
11 deny plaintiff's motion for summary judgment (#34).

12 IT IS SO ORDERED.

13 Dated this 13th day of October, 2005.

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15  
16 /s/ Dennis James Hubel  
17 Dennis James Hubel  
18 United States Magistrate Judge  
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